Washington Law Review

Volume 31 | Number 3

8-1-1956

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WASHINGTON LAW REVIEW

AND

STATE BAR JOURNAL

VOLUME 31 AUTUMN, 1956 NUMBER 3

THE FEDERAL TORT CLAIMS ACT A PROPOSED CONSTRUCTION OF THE DISCRETIONARY FUNCTION EXCEPTION

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On August 2, 1946, after nearly thirty years of Congressional consideration, drafting, and redrafting, a federal tort claims act of general applicability was adopted.[1] In basic outline the act is simple.[2] It subjects the United States to liability in the federal courts for money damages " . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[3] From this general acceptance of local state law as a measure of the government's liability[4]

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[1] The Federal Tort Claims Act was adopted as Title IV of the Legislative Reorganization Act of 1946, 60 STAT. 842. The statute was reenacted with some minor changes in the 1948 revision of the Judicial Code.

[2] The basic provisions of the act are found in eleven sections of the Judicial Code, 28 U.S.C. §§ 1346 (b), and 2671-80. A two-year period of limitations on tort claims is established by 28 U.S.C. § 2401 (b), trial by jury is denied by 28 U.S.C. § 2402; interest and costs are governed by 28 U.S.C. §§ 2411 and 2412; and 28 U.S.C. § 1402 lays the venue of tort claims actions in the district in which the plaintiff resides or wherein the act or omission complained of occurred. Jurisdiction to review decisions of the district courts is conferred by the general provisions of 28 U.S.C. § 1291, and an alternate, but unused, appellate jurisdiction in tort claims cases is conferred on the court of claims by 28 U.S.C. §§ 1504 and 2110.

[4] The Government's contention that the determination of whether a member of the military was acting in line of duty or in the scope of his employment should be determined by federal, and not local state law, was rejected in Williams v. United States, 350 U.S. 857 (1955), *reversing per curiam* 215 F.2d 800 (9th Cir. 1954). However, the acceptance of a local law standard is not complete. As mentioned above, 28 U.S.C. § 2401 (b) establishes an exclusive two year period of limitation on Federal Tort Claims Act cases. 28 U.S.C. § 2674 prohibits assessment of interest prior to judgment or punitive damages and allows instead actual or compensatory damages for wrongful death in those states providing only punitive damages in such actions. The local conflict of laws rule was not applied in United States v. Union Trust Company, 221 F.2d 62

a number of express exceptions from liability were made.[5] Although the wisdom or necessity of several of the express exceptions may be questionable, only one of them—the discretionary function exception —appears to have given rise to considerable confusion and litigation.

Other exceptions have been drawn by implication from the language of the act and its relationship with other compensation legislation. For example, the Supreme Court of the United States has held that since the act may be invoked only on a "negligent or wrongful act or omission" of an employee, liability does not arise by virtue of either United States ownership of an inherently dangerous commodity or property or of engaging in an extra hazardous activity.[6] Liability of the United States to members of its military forces for personal injuries and property damage has been the subject of a substantial amount of litigation producing refined distinctions not found in the express language of the act.[7] Some courts developed by implication another exception from liability where the activity involved was considered "governmental" and without an analogous private counterpart because the statutory language imposes liability "... under circumstances where the United States, if a private person, would be liable..." But this escape from liability has been closed, or at least strictly limited, by the recent decision of the Supreme Court in *Indian Towing Company v. United States*.[8] Although the implied exceptions have undoubtedly caused surprise to some litigants and a considerable amount of

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(D.C.Cir. 1955), *cert. denied* 350 U.S. 911 (1955). See also Feres v. United States, 340 U.S. 135 (1950). For a discussion of other areas in which the results of a suit under the Federal Tort Claims Act might differ from those in a local private action, see Gottlieb, *State Law Versus A Federal Common Law of Torts*, 7 VAND. L. REV. 206 (1954).

[5] Express exceptions other than the discretionary function exception include those for assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. Also expressly excepted are claims arising out of the loss, miscarriage, or negligent transmission of letters or postal matter; claims arising in respect of the assessment or collection of any tax or customs duty; claims for which a remedy is provided by the Suits in Admiralty Act or the Public Vessels Act; claims arising out of the administration of The Trading With the Enemy Act; claims for damages caused by the imposition or establishment of a quarantine; claims for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system; claims arising out of the combatant activities of the military or naval forces during time of war; and claims arising from the activities of the Tennessee Valley Authority or the Panama Canal Company. 28 U.S.C. § 2680.

[6] Dalehite v. United States, 346 U.S. 15, 44-45 (1953). *But cf.* United States v. Praylou, 208 F.2d 291 (4th Cir. 1953), *cert. denied* 347 U.S. 934 (1954).

[7] See Brooks v. United States, 337 U.S. 49 (1949); Feres v. United States, 340 U.S. 135 (1950); United States v. Brown, 348 U.S. 110 (1954); Archer v. United States, 217 F.2d 548 (9th Cir. 1954), *cert. denied* 348 U.S. 953; Preferred Insurance Co. v. United States, 222 F.2d 942 (9th Cir. 1955), *cert. denied* 350 U.S. 837.

[8] 350 U.S. 61 (1955). See also United States v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), *aff'd, per curiam*, 350 U.S. 907 (1955).

litigation, the difficulties which they have produced are small when compared with those created by the express discretionary function exception.

Indeed the vast amount of litigation concerning the discretionary function exception has tended to obscure the fact that the act is one which draws as much, if not more, of its content from tort law as from the words of the statute. Able Government attorneys have an expertness and familiarity with the particular statute. From a natural inclination to do battle on familiar grounds, they draw the combat into an area where statutory construction, legislative history, and the mysteries of governmental operations are of prime importance, and away from the orthodox principles of tort law with which private practitioners are familiar. That the orthodox principles of law, without the express statement of the exception, would preclude allowance by the judiciary of claims which would obstruct normal governmental operations or upset the traditional relationship of the judiciary with the other branches of the Government appears certain when federal cases involving the exception are compared with cases arising under the New York Court of Claims Act, which contains a broad waiver of immunity for torts without such an exception.[9] That misunderstanding, resulting in injustice, has been the product of the express exception is strongly suggested when other federal cases are compared with New York cases.[10] The confusion merges with surprise when one is told that the exception was added "as a clarifying amendment" to

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[9] *Compare* Barrett v. State of New York, 220 N.Y. 423, 116 N.E. 99 (1917) *with* Sickman v. United States, 184 F.2d 616, (7th Cir. 1950), *cert. denied* 341 U.S. 939. With respect to liability for failure to extinguish fires, *compare* Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945) *with* Dalehite v. United States 346 U.S. 15 (1953) and Rayonier Incorporated v. United States 225 F.2d 642 (9th Cir. 1955), *cert. granted* 351 U.S. 905. With respect to liability for failure to maintain signals properly, *compare* Foley v. State, 294 N.Y. 275, 62 N.E.2d 69 (1945) *with* Indian Towing Company v. United States, 350 U.S. 61 (1955). As to Justice Frankfurter's statement in the latter case that the Coast Guard need not undertake lighthouse service, but is liable for negligence if it does so, *compare* Metildi v. State, 177 Misc. 179, 30 N.Y.S.2d 168 (Ct.Cls. N.Y., 1941). With respect to liability for failure to enforce laws or make different laws, *compare* Murrain v. Wilson Line, 59 N.Y.S. 2d 750, 70 App. Div. 372, *aff'd* 296 N.Y. 845, 72 N.E. 2d 29 (1947), Young v. State, 278 App. Div. 997, 105 N.Y.S.2d 657 (1951), and Chastine v. State, 160 Misc. 828, 290 N.Y.S. 789 (Ct. Cls. N.Y. 1936) *with* Dalehite v. United States, *supra*. With respect to the liability of regulatory agencies, *compare* Toyos v. State, 181 Misc. 761, 47 N.Y.S.2d 322 (Ct. Cls. N.Y., 1944) with Schmidt v. United States, 198 F.2d 32 (7th Cir. 1952), *cert. denied* 344 U.S. 896. *Compare also* Goldstein v. State of New York, 281 N.Y. 396, 24 N.E.2d 97 (1939) *with* Feres v. United States, 340 U.S. 135 (1950).

[10] *Compare* Weihs v. State, 267 App. Div. 233, 45 N.Y.S.2d 542 (1943); Joachim v. State, 180 Misc. 963, 43 N.Y.S.2d 167 (Ct. Cls. N.Y., 1943) *with* Smart v. United States, 207 F.2d 841 (10th Cir. 1953); Goodwill Industries of El Paso v. United States, 218 F.2d 270 (5th Cir. 1954); and Kendrick v. United States, 82 F. Supp. 430 (N.D. Ala. 1949). *Compare also* Williams v. State 308 N.Y. 548, 127 N.E.2d 545 (1955),

embrace cases that would have been exempted by judicial construction.[11]

Nor has the effect of the exception been limited to cases arising under the Federal Tort Claims Act. The suggestion of such a defense in the one act has been a sufficient reminder to ensure its being raised in actions under previous, limited waivers of immunity for torts such as the Suits in Admiralty Act and the Public Vessels Act.[12] The brief for the Government in *Canadian Aviator, Ltd. v. United States*,[13] which was a suit under the Public Vessels Act decided before adoption of the Federal Tort Claims Act, contained but two pages devoted to the argument that public policy precluded the imposition of liability under the Public Vessels Act for damage inflicted upon a vessel following directions given to it while in convoy during wartime. If the case were to arise today, one may be assured that many pages would be devoted to an argument that the naval vessel involved was engaged in performance of a discretionary function. Nor would the argument

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reversing a judgment against the state, not on a discretionary function theory, but on a traditional, though perhaps incorrect, application of the risk theory of tort liability. See RESTATEMENT, TORTS § 319 (1934).

One may be almost certain that a lengthy discussion of the discretionary function exception would be necessary for disposition of a case against the federal government such as Rosenweig v. State, 208 Misc. 1065, 146 N.Y.S. 2d 589 (Ct. Clms. N.Y., 1955) (State liable for the death of a boxer who, through the negligence of the examining doctors, was permitted to fight again after having been the victim of two technical knock-outs within the preceding five weeks).

[11] Dalehite v. United States, 346 U.S. 15, 26-27 (1953).

The most frequently quoted excerpt from the legislative history of the exception is a paragraph which was repeated time and again in the reports on tort claims legislation from the time of the insertion of the exception in the bills under consideration. See H. R. REP. No. 2245, 77th Cong., 2d Sess., 10 (1942); S. REP. No. 1196, 77th Cong., 2d Sess., 7 (1942); H. R. REP. No. 1287, 79th Cong., 1st Sess., 5-6 (1945); *Hearings Before House Committee on Judiciary on H. R. 6463*, 77th Cong., 2d Sess., p. 33 (1942). The paragraph reads as follows:

"Section 402 specifies the claims which would not be covered by the bill. The first subsection of section 402 exempts from the bill claims based upon the performance or nonperformance of discretionary functions or duties on the part of a Federal agency or Government employee, whether or not the discretion involved be abused, and claims based upon the act or omission of a Government employee exercising due care in the execution of a statute or regulation, whether or not valid. This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the

go unmentioned in the opinion of the Court. An argument that the failure to mark or remove a sunken government owned vessel was only a failure to perform a governmental duty and not such a failure as gave rise to liability received only passing mention in the decision of *Eastern Transportation Co. v. United States.*[14] Today, dressed in the language of discretionary function, it would provide one of the major bases for decision. A claim for the loss of cocoa beans during time of war caused by the overturning of a barge upon removal of the beans to make warehouse space for incoming military stores and provide ballast for departing vessels was decided upon the basis of the ordinary rules applicable to carriers.[15] Today one might be sure that the discretionary function exception would play an important part in determining liabilities. To be sure, arguments akin to the discretionary function exception arguments of the Government are implicit in statutes waiving governmental immunity in suits for torts. But the vast amount of litigation suggests that the amendment by which the exception was added did not achieve its purpose of clarifying the law, and, as suggested above, the variation in the results of litigation suggests that with the confusion injustice has come.[16]

The purpose of this article is a limited one. It contains no suggestions for a broad statutory scheme for distributing all the burdens and costs of government. Its purpose is to suggest no more than a workable and just construction for the discretionary function exception of the statute. For the greatest part, the suggestion is no more than what the legislative history of the exception suggests—that the courts take note of the special problems of determining the liability

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constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, the common-law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies. Thus, section 402 (5) and (10), exempting claims arising from the administration of the Trading With the Enemy Act or the fiscal operations of the Treasury, are not intended to exclude such common-law torts as an automobile collision caused by the negligence of an employee of the Treasury Department or other Federal agency administering those functions."

[12] See, *e.g.*, P. Dougherty Co. v. United States, 207 F.2d 626 (3rd Cir. 1953), *cert. denied* 347 U.S. 912; Carr v. United States, 136 F. Supp. 527 (E.D. Va. 1955). Similar arguments had been successfully made, however, prior to adoption of the Federal Tort Claims Act, in suits brought against the T.V.A. Lynn v. United States, 110 F.2d 586 (5th Cir. 1940); Posey v. Tennessee Valley Authority, 93 F.2d 726 (5th Cir. 1937); and in a suit against the Home Owners Loan Corporation, Adamo v. H.O.L.C., 107 F.2d 139 (8th Cir. 1939).

[13] 324 U.S. 215, (1945). See the Government's brief, pp. 20-22.

[14] 272 U.S. 675, (1927).

[15] O. F. Nelson & C. Ltd. v. United States, 149 F.2d 692 (9th Cir. 1945).

[16] *Compare*, for example, Denny v. United States, 171 F.2d 365 (5th Cir. 1948), *cert. denied* 337 U.S. 919 *with* Costley v. United States, 181 F.2d 723 (5th Cir. 1950) and United States v. Gray, 199 F.2d 239 (10th Cir. 1952).

of the Government for torts and then proceed to decide the cases as they would have done if the exception were not present in the act. They will not be without guides if they do so. Historical analogies from the fields of mandamus actions and private damage suits against government officials, if analyzed in light of the reasons for the decisions, give some aid. More important, the principles of ordinary tort law supply answers to the liability of the Government under the act.

First, however, it seems appropriate to turn to the language of the act and the leading cases decided under it.

THE STATUTORY LANGUAGE AND LEADING CASES

The discretionary function exception is found in 28 U.S.C. § 2680 (a) as a part of a bifurcated exception from liability. The language of the exception is that the act shall not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The first portion of the exception—that relating to acts or omissions in the execution of a statute or regulation—is susceptible of understanding without great difficulty and has caused little litigation. But it should be noted, for the meaning it gives to the balance of the exception, that to be applicable, the exception requires that the employee have been exercising due care in the execution of the statute or regulation. In short, the exception precludes a test of the validity of a statute or regulation through the means of a tort action, but it will not bar recovery for acts or omissions of an employee which are otherwise negligent or wrongful.[17]

Difficulty with the second portion of the exception—the portion relating to exercise or performance of a discretionary function—becomes apparent almost immediately. It is an obvious proposition that most claims for damages caused by negligent acts are based upon the abuse of discretion, either in the exercise or the failure to exercise discretion. For example, the mail truck driver hurrying to get a load of mail on a departing train exercises some discretion in deciding whether to make a left turn before oncoming traffic or to wait until that traffic has passed. Just as obvious is the proposition that such discretionary

[17] Hatahley v. United States, 351 U.S. 173 (1956).

determinations must not be excluded if the act is to have any effect. The difficulty created by the conflict of these two obvious propositions grows as the nature of the discretionary decision changes, and a search for a meaning other than the usual dictionary definitions of "discretionary" becomes imperative.

Until the 1955 term of the Supreme Court the leading case on the meaning of the discretionary function exception was *Dalehite v. United States*,[18] a test case for the many claims growing out of the explosion at Texas City, Texas, of fertilizer grade ammonium nitrate which had been manufactured for the United States. In opposing the grant of certiorari in that case, the Government admitted the general importance of determining the scope of the discretionary function exception but argued, "The present case, however, does not present an appropriate factual context for a definitive decision in this twilight zone, even if the failure of proof (of negligence) is not regarded as decisive, because petitioners charged the whole Government as such with negligence, and did not focus their pleadings or proof upon any particular negligent acts or omission."[19] The number of claimants and the amount of damages involved probably made the case of sufficient importance to justify review by certiorari, but the force of the Government's argument against granting the writ emerges again in the statement in the majority opinion that "It is unnecessary to define, apart from this case, precisely where discretion ends."[20] Indeed, as will be suggested later, it appears that the Government may have won a broader defensive position in that case than it attempted to establish.

The facts of the *Dalehite* case were as follows: at the end of World War II the obligations of the United States as an occupying power and the dangers of international unrest made it necessary for the government to formulate plans for feeding the populations of occupied countries. Shipment of fertilizers had an obvious advantage over the direct shipment of food. Following cabinet approval of the plan, deactivated ordnance plants were put into operation on contracts with private concerns for the manufacture of fertilizer grade ammonium nitrate under detailed specifications provided by the Field Director of Ammunition Plants. The Field Director acted under authority delegated to him by the Army's Chief of Ordnance, on whom responsibility for carrying out the plan had been placed. The specifications provided

[18] 346 U.S. 15 (1953).
[19] Brief in Opposition to the petition for certiorari, p. 11, Dalehite v. United States, *supra*, note 18.
[20] 346 U.S. at 35.

for the private concerns were drawn up in light of prior experience of private concerns and the TVA. They established such details as a bagging temperature of the fertilizer at 200° F.; the type of moisture-proof paper bagging; the labeling of the bags; and a coating material of paraffin, rosin and petrolatum for the grains of fertilizer. Each of these specifications was of importance in the case because fertilizer grade ammonium nitrate is an oxidizing material which gives off oxygen to support combustion in carbonaceous material when heated. The fertilizer did not cool when shipped, but continued at high temperatures to the point where it was loaded on ships.

The particular fertilizer involved in the Texas City explosion was loaded on a vessel carrying a substantial cargo of explosives. When a fire occurred in the fertilizer in the hold of the vessel, attempts to put it out by closing the hatches and introducing steam were, of course, unsuccessful. A terrific explosion occurred, leveling much of the city and killing many people. Fire spread to another vessel likewise loaded with fertilizer. Attempts to tow that vessel to sea were unsuccessful, and a second devastating explosion occurred. Former experience had not revealed this explosive quality of fertilizer grade ammonium nitrate, but the experimental tests of the fertilizer conducted by the government had not exhausted the possibilities of discovering this quality.

In a four to three decision the Supreme Court affirmed the Court of Appeals decision, which reversed the District Court's judgment against the Government. The Supreme Court held that the discretionary function exception barred recovery. The majority of the Court said:[21]

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. *Where there is room for policy judgment and decision there is discretion.* It necessarily follows that the acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680 (a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion. (emphasis supplied.)

[21] 346 U.S. at 35-36.

Of the decisions to establish each of the specifications mentioned above, the majority said ". . . the considerations that dictated the decisions were crucial ones, involving the feasibility of the program itself . . ," that ". . . they were the product of an exercise of judgment, requiring consideration of a vast spectrum of factors, including some which touched directly the feasibility of the fertilizer program . . ."[22] The decision to label the bags only as "oxidizing material" was dictated by the pertinent ICC regulations, and those regulations were immune from attack under the first phrase of §2680 (a).[23] The District Court's findings of negligence in the failure to prevent the fire by regulating storage or loading of the fertilizer in some different fashion fell classically within the exception of discretionary governmental decisions. Likewise, the alleged failure of the Coast Guard in fighting the fire would not result in liability because the act did not create new causes of action where none existed before, nor did it change the rule that an alleged failure or carelessness of public firemen does not create private actionable rights.[24]

The three dissenting justices were of the opinion that the duty of further inquiry and negligence in shipment and failure to warn were sufficient to support the District Court's judgment against the Government. They would not have based liability on any decision taken at cabinet level; their view was that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. While recognizing immunity in the area in which an official exerts governmental authority in a manner which legally binds one or many, they viewed the execution of the fertilizer program as indistinguishable from activities performed by private individuals. Though the official decisions involved required a nice balancing of various considerations it was, they believed, the kind of balancing which citizens do at their peril, and hence not within the exception of the statute.

That the majority opinion gave a broader defensive effect to the discretionary function exception than the Government attempted to establish is suggested by comparison of portions of the majority opinion with the argument of the Government's brief. As set out above, the majority said, "Where there is room for policy judgment and decision there is discretion." The Government's brief said, "We do not urge that every act or omission in the course of fulfilling a discretionary program is automatically excluded from coverage because the initial

[22] 346 U.S. at 40.
[23] 346 U.S. at 42.
[24] 346 U.S. at 43.

establishment of the program was discretionary . . .; on the contrary, our position is that every act or omission which we claim to be covered by the 'discretionary' exception must involve, in itself and not merely by parentage or affiliation, a discretionary function."[25] Elsewhere in its brief the Government argued that the planning and execution of the fertilizer program *had to be based* on evaluation of governmental interests such as the speed with which the fertilizer had to be produced in order to safeguard our troops and avoid further outbreaks of hostilities;[26] that an important factor in the determination to accept the existing specifications and practices for manufacture *was* the governmental interest in obtaining as rapidly as possible fertilizer for war-torn regions;[27] and that each of the decisions as to bagging temperature, the coating material, the use of paper bags, and the shipping notices involved complex value judgments *based* upon special governmental needs. Indeed, the matter of reducing the bagging temperature was specifically reconsidered and the suggestion rejected because, among other things, it would have resulted in a substantial loss of necessary production.[28]

Each of these matters does appear in the majority opinion, and the majority did say, "The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program."[29] But nowhere does the majority state, as the Government had argued, that each decision *was* based upon a determination that the course of conduct pursued was necessary or desirable for achievement of the objectives of the Government's fertilizer program. The majority opinion says that ". . . having manufactured and shipped the commodity FGAN for more than three years without even minor accidents, the need for further experimentation was a matter of discretion,"[30] not that the discretion involved in determining that immediate production of fertilizer without further experimentation *was necessary for achievement of the governmental objectives* precluded imposition of liability on the basis of the decision to adopt existing practices. The majority opinion says that the decision to keep the product in the graining kettles for a longer period or to install cooling equipment would result in greatly increased production costs

[25] Brief for the United States, p. 177, 346 U.S. 15 (1953)
[26] *Id.*, p. 214.
[27] *Id.*, pp. 218-219.
[28] *Id.*, pp. 222, 223, 226.
[29] 346 U.S. at 42.
[30] 346 U.S. at 38.

and/or greatly reduced production, and was not a decision which courts were empowered to cite as negligence;[31] not that the need for immediate quantity production of fertilizer *to achieve the governmental objectives of the program* made discretionary the determination to bag the fertilizer at the higher temperature. When coupled with its statement that where there is room for policy judgment and decision there is discretion, the statements in the majority opinion are susceptible of an interpretation which gives immunity where governmental policy decisions might have been, but in fact were not, the cause of the harm for which suit is brought. In short, it suggests that a negligent oversight, unconnected with governmental policy or objectives, would not give rise to liability because it was committed in the area where discretion might have been, but in fact was not, involved.

If this were all that the Supreme Court had said on the subject, suggestion of a different construction of the discretionary function exception might constitute little more than a futile exercise in statutory interpretation. But two more tort claims cases came before the Supreme Court in the 1955 term. Though the decisions say little directly about the discretionary function exception, they are reminders of the limited nature of the *Dalehite* definition of the exception and suggest that, through interpretation in an area left open by the *Dalehite* decision, an interpretation of the exception different from that suggested by the decision may eventually result. Those cases are *Indian Towing Company v. United States*[32] and *United States v. Union Trust Company.*[33]

The *Indian Towing* case involved a claim for the loss of a cargo which occurred when a tug ran aground, allegedly because of the negligence of the Coast Guard in the inspection and repair of an unwatched lighthouse light and in failing to give warning that the light was not operating. The Government did not base its defense on the discretionary function exception. It conceded that the question

[31] 346 U.S. at 40-41.
[32] 350 U.S. 61 (1955).
[33] 350 U.S. 907 (1955). For those who find significance in such things it may be interesting to note that the Dalehite case was decided by a four to three majority, with Justices Clark and Douglas not participating. In the Indian Towing Company case, Justice Douglas joined those who had dissented in the Dalehite case, while Justice Clark joined those who had constituted the majority in that case. However, the late Chief Justice Vinson, who had voted with the majority in the Dalehite case, was replaced by Chief Justice Warren, who joined with the dissenters of the Dalehite in deciding the Indian Tow case. The late Justice Jackson, who had written the dissent in the Dalehite case was replaced by Justice Harlan, who also joined the former dissenters. In effect, the majority deciding the Indian Towing Company case consisted of those who had dissented in the Dalehite case plus new members of the court and one member who had not participated in the decision of the earlier case.

involved was one of liability at a level susceptible of characterization as the "operational level"—a phrase appearing in the majority *Dalehite* opinion—and that the exception was not involved. Instead, the Government sought to establish another defense suggested by the language of the act, the decision in *Feres v. United States*,[34] and certain portions of the *Dalehite* opinion: that there could be no liability under the act because the activity involved was uniquely governmental and without a private counterpart from which a standard of conduct and liability could be drawn. This was rejected by a majority of the Court. They believed the liability of a volunteer or "good Samaritan" of general tort law to be a sufficiently persuasive analogy.

Although the Government conceded in the *Indian Towing* case that the discretionary function exception was not applicable, no such concession was made in the *Union Trust Company* case.[35] But the Supreme Court affirmed a judgment against the United States in a per curiam opinion, citing only the *Indian Towing* decision. In the *Union Trust Company* case the Court of Appeals for the District of Columbia had affirmed a judgment against the United States for the wrongful deaths of passengers on an Eastern Airlines plane which crashed while landing at Washington National Airport when it was struck by a P-38 military plane piloted by a Bolivian pilot.[36] The basis of imposing liability on the Government was the negligence of an employee of the Civil Aeronautics Administration in the control tower at the airport. His negligence consisted of failing to issue a timely warning to the Eastern plane that the P-38 was also on a final approach to the airport; in failing to warn the P-38 pilot that the Eastern plane was likewise on a final approach; in clearing both planes for landing on the same runway at approximately the same time; and in failing to keep each of the planes advised of the activities of the other. These specifications of negligence are certainly susceptible of the characterization given them by the Court of Appeals as acts and failures to act at the "operational level." If the characterization is accepted, the acts on which liability was based fall within the area of the Govern-

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[34] 340 U.S. 135 (1950).

[35] The petition for certiorari filed by the Government in the Union Trust Company case stated as one of the questions presented: "Whether the discretionary function exception of that Act (28 U.S.C. § 2680 (a)) bars claims arising from the discretionary acts of federal employees at 'the operational level' as well as acts at the policy-forming level." The Supreme Court took the unusual action of granting the petition and affirming on the basis of the briefs then filed.

[36] Eastern Airlines Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), *aff'd* 350 U.S. 907.

ment's concession in the *Indian Towing* case and an area marked out by indirection in the *Dalehite case.*[37]

Acceptance of classifications based on the level of the discretionary activities involved would provide a terminology with a superficial appeal. It would, however, do little to solve the problem of what is an exempt discretionary function. Indeed, the distinction between activities at the "operational level" and those at the "planning level" is susceptible of no greater precision in definition than the distinction between activities which are "governmental" and those which are "non-governmental" or "proprietary"—a distinction which the realigned majority in the *Indian Towing* case emphatically rejected as a quagmire of municipal law, based on casuistries and requiring the reconciliation of the irreconcilable.[38] It would be surprising if that same majority intended to accept a vague classification of levels of activities as a basis for rejecting the Government's argument that the discretionary function exception applied in the *Union Trust Company* case.[39] If they did, they furnished no criteria for determining what is activity at the operational level, and none had been previously given.

Not only would acceptance of such a classification involve all the

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[37] In the Dalehite decision the majority made this statement, quoted above: "The decisions held culpable were all responsibly made *at a planning rather than operational level* and involved considerations more or less important to the practicability of the Government's fertilizer program." (emphasis supplied). 346 U.S. at 42. That this conclusionary statement was not intended to establish the criteria for determining applicability of the exception is indicated by the statement made a few pages earlier that, "It is unnecessary to define, apart from this case, precisely where discretion ends." 346 U.S. at 35. If the majority in the Dalehite case had intended to establish such a test of liability, more than a passing mention of the term would probably have appeared in the opinion. The majority opinion appears to have been directed more toward determining where discretion lay than toward establishing a distinction between the operational and the planning levels of governmental activity. Nevertheless, the distinction has been accepted by some of the lower courts as determinative. See, *e.g.*, Eastern Airlines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955) *aff'd* 350 U.S. 907, Sullivan v. United States, 129 F. Supp. 713 (N.D. Ill. 1955).

[38] 350 U.S. at 65.

[39] Though the per curiam opinion does *not* so state, it is possible that the grant of certiorari was intended for review of only the first question presented by the government: whether operation of a control tower at an airport is a uniquely governmental function, without a private counterpart, and hence excluded from the area of liability by the language of the act authorizing suits "... where the United States, if a private person, would be liable to the claimant..." This, of course, was the only comparable question decided in the Indian Towing Company case, unless a concession made in one case becomes the law for future cases.

The explanation advanced by the Government for its concession in the one case and its insistence on the applicability of the exception in the other was that, unlike the duties of the Coast Guard in the Indian Towing Company case, control tower operators had a duty not only to warn, but to regulate and control aircraft in flight. Gov. Pet. for Cert., p. 20. Thus control tower operators performed activities more analogous to police or regulatory work involving governmental discretion. *Id.*, pp. 32-35. Though the distinction may not have great appeal, it is certainly not one which should be rejected without explanation.

difficulties inherent in a formula for determining liability stated in terms only vaguely definable, but it would also present a scheme for disposition of cases which would have none of the appearance of justice. One may ponder at length what is the difference, other than the rank and pay of the employee involved, between a decision to bag an oxidizing material at high temperature and a decision to allow two airplanes to approach an airport runway at approximately the same time—why one is "operational" and the other "planning"—unless it be that one decision was deliberately made upon consideration that the choice was required for the furtherance of a governmental program whereas the other, if not made through oversight and without consideration of the objectives of the governmental program, at least bore but slight relationship to it. To phrase the test of liability in terms which leave out its essential component would result in both confusion and dissatisfaction.

For example, this problem could arise in a case such as the *Indian Towing* case. Suppose the only negligence established by the plaintiff is the infrequency of inspection. Suppose further that the government shows that, after explanation of its operating procedures and possible alternatives upon presentation of its requests for funds to Congress, the Coast Guard received appropriations which required some curtailment of operations; that the Commandant of the Coast Guard, after consideration of the alternatives among others of reducing the number of unwatched lights or the scheduling of less frequent inspections, deliberately followed his previously stated preference for the latter; and that the light involved was in fact inspected in accordance with the schedule thus established. Surely the characterization of frequency of inspection as a matter at the "operational level" would no longer be appropriate.[40] And just as certainly, provided the Government's proof of the matters listed above was firm and convincing, to permit recovery would allow a private citizen to challenge and overturn a Congressional determination of the amount of money which should be appropriated for Coast Guard purposes and the decision of an authorized officer

[40] *Cf.* Olson v. United States, 93 F. Supp. 150 (D.N.D. 1950), cited with approval by the majority in the Dalehite decision, 346 U.S. at 37, holding the discretionary function exception applicable to a claim for damages to property caused when employees of the Fish and Wildlife Service opened the dam, releasing large quantities of flood waters into a river channel blocked with ice. Though it may have been improper to dismiss the complaint without proof that the waters were released pursuant to the authority of someone authorized to determine that such action was necessary to achieve the purposes for which the dam was erected, the case is a reminder that the nature of some governmental operations requires that a large portion of the discretion involved be exercised by employees at the "operational level."

as to how the money appropriated should be spent. If the discretionary function exception has any meaning, it must encompass determinations of this kind.

GUIDES TO A PROPER CONSTRUCTION

Some guides to a proper construction of the discretionary function exception can be found in the law and cases antedating the Tort Claims Act. Two lines of cases—mandamus actions and private damage suits against public officers—provide the most persuasive analogies because they so intimately involve the relationship between the judiciary and the other branches of government. This, of course, is in broad terms the problem of the discretionary function exception. But, as in other situations,[41] the adoption of the Tort Claims Act has itself changed the weights and forces on the balancing scales, and an unchanged incorporation of terminology or tests developed in other contexts is unlikely to provide a rationale for the exception or to serve the purposes of the act. Nevertheless, these historical analogies are of considerable assistance in determining the meaning of the exception.

For example, reference to mandamus actions would discredit a distinction between actions taken at the "planning level" and actions taken at the "operational level." Since the decision in *Marbury v. Madison*[42] it has been established in this country that mandamus will not issue to control executive discretion in matters which are political or by the Constitution and laws of the United States committed to the official for discretionary action. But that decision also established the proposition, not since repudiated, that "It is not by the office of the person to whom the writ is directed but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined."[43]

Likewise, the blanket immunity suggested by the *Dalehite* decision finds no support in mandamus actions against public officials. Mandamus is not refused merely because the official *might* have made his decision upon the basis of discretionary powers vested in him. That is, it is no defense on the part of a public official to a petition for writ of mandamus to answer merely that the area involved is one in

[41] *Cf.* NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). *Cf. also* Larson v. Domestic & Foreign Corp., 337 U.S. 682, at 686-688 (1949, refusing to accept the immunity or liability of public officers in private damage suits as determinative of when equitable actions to enjoin public officers may be maintained.

[42] 1 Cranch 137 (1803).

[43] 1 Cranch at 170-171.

which he might have exercised discretion. He must go further and prove either that the decision he made *was* made in the exercise of discretionary powers given him,[44] or that, in the exercise of the discretion given him, he decided to take no action.[45] If the area of discretion is clear, proof usually need be no more than his statement. But there must be proof that discretion was involved. Several cases even go so far as to allow mandamus to compel the re-exercise of discretion where the original determination was made upon a mistake or misapprehension as to the effect of a law.[46]

Acceptance of the analogy with the limitations of the immunity recognized in the mandamus field would render the discretionary function exception inapplicable to acts or omissions which might have been directed in the exercise of discretion if in fact they were not. It would also reconcile the results of the *Dalehite, Indian Towing*, and *Union Trust Company* cases. The former involved affirmative, discretionary determinations as to what should be done and what risks would be encountered to achieve certain governmental objectives; the latter two did not.

The other historical analogy which deserves detailed consideration is the immunity of public officials from private actions for damages caused by the performance of authorized acts involving the exercise of discretion. Acceptance of the analogy by the majority in the *Dalehite* case is indicated by the citation of *Spaulding v. Vilas*[47] and *Alzua v. Johnson*[48]. The dissenters also recognized that official discretionary activities should be controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits.[49] The principle has been applied to accord immunity to official discretionary acts of not only judges[50] and cabinet officers[51] but to the Comptroller

[44] Kendall v. United States, 12 Peters 524, 37 U.S. 429 (1838); Roberts v. United States, 176 U.S. 221 (1900); Lane v. Hoglund, 244 U.S. 174 (1917).

[45] New York Life and Fire Insurance Co. v. Wilson, 33 U.S. 291, at 303, 8 Peters 291, at 303 (1834); see Commissioner of Patents v. Whiteley, 71 U.S. 522, at 534, 4 Wallace 290 (1866); Wilbur v. United States, 281 U.S. 206 at 218 (1930).

[46] *Ex parte* Kawato, 317 U.S. 69 (1942); Louisville Cement Co. v. I.C.C., 246 U.S. 638 (1918); Interstate Commerce Commission v. Humboldt Steamship Co., 224 U.S. 474 (1911); Hudson v. Parker, 156 U.S. 277 (1895). A similar review of the discretionary decisions of government employees in suits under the Federal Tort Claims Act is probably precluded by the phrase in 28 U.S.C. § 2680 (a) "... whether or not the discretion involved be abused." But cases such as *Ex parte* Kawato, *supra*, support the suggestion made *infra*, that the discretionary function exception is no bar to recovery for acts or omissions might have been directed in the exercise of discretion if they in fact were not.

[47] 161 U.S. 483 (1896).

[48] 231 U.S. 106 (1913).

[49] 346 U.S. at 59.

[50] Alzua v. Johnson, *supra*, n. 48.

[51] Kendall v. Stokes, 3 How. 87, 44 U.S. 87 (1845); Spalding v. Vilas, *supra*, note

of the Currency,[52] members of the Securities Exchange Commission,[53] a member of the Federal Parole Board,[54] Selective Service Board officials,[55] local United States Attorneys and assistants,[56] and a number of other subordinate officials.[57] The principle affords immunity even though the official acts maliciously, and, in what is frequently taken as the most authoritative statement of the principle,[58] Judge Learned Hand held that the immunity exists, not only where the official acts for the public good, but where the occasion *would* have justified the act, if he had been using his power for any of the purposes for which it was vested in him.[59]

The broad immunity thus granted is frankly based on a balance of the evils inherent in the alternatives presented.[60] To accord immunity denies compensation to one who has been injured and leaves the correction and punishment of truant officials to his administrative superiors, who may lack the zeal or interest to see that justice is done. To deny immunity exposes the official to review in court of each of his actions and subjects him to a possible personal liability if he decides incorrectly; it would thus encourage official timidity and discourage free and fearless discharge of duties; and it would render public offices undesirable positions. If claims could be restricted to those where the official acted maliciously or for other than official purposes, the immunity would cease at that point, but the nature of disappointed litigants is such that all official action would be subjected to the test of a trial. Upon a balance, the public interest seems better served by granting the complete immunity.

Complete acceptance of the analogy would support the blanket immunity suggested by the *Dalehite* decision. But, the enactment of the Federal Tort Claims Act itself has made the analogy inexact. The

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47; Standard Nut Margarine Co. v. Mellon, 72 F.2d 557 (D.C. Cir. 1934), *cert. denied* 293 U.S. 605; Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), *cert. denied* 311 U.S. 718; Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied* 339 U.S. 949.

[52] Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938), *cert. denied* 305 U.S. 643.

[53] Jones v. Kennedy, 121 F.2d 40 (D.C. Cir. 1941) *cert. denied* 314 U.S. 665.

[54] Lang v. Wood, 92 F.2d 211 (D.C. Cir. 1937), *cert. denied* 302 U.S. 686.

[55] Gibson v. Reynolds, 172 F.2d 95 (8th Cir. 1949), *cert. denied* 337 U.S. 925; Dodez v. Weygandt, 173 F.2d 965 (6th Cir. 1949).

[56] Cooper v. O'Connor, *supra*, note 52; Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S. 503.

[57] Papagianakis v. The Samos, 186 F.2d 257 (4th Cir. 1950), *cert. denied* 341 U.S. 921. And see the many authorities discussed in the cases cited notes 51-56 *supra*.

[58] Gregoire v. Biddle, *supra*, note 51.

[59] 177 F.2d at 581.

[60] Gregoire v. Biddle, *supra*, 177 F.2d at 581; Papagianakis v. The Samos, *supra*, 186 F.2d at 260; Cooper v. O'Connor, *supra*, 99 F.2d at 137; Gibson v. Reynolds, *supra*, 172 F.2d at 97. See James, *Tort Liability of Governmental Units*, 22 U. OF CHI. L. REV. 610 at 647 (1955).

balance struck in the private damage actions is inconsistent with the newly adopted policy of compensating persons injured by governmental operations. Though courts should not review or revise discretionary decisions actually made by authorized officials, most of the reasons which gave rise to the broader immunity given individual officers have no application in suits against the Government under the act. The act specifically provides that a judgment in a suit against the Government shall be a complete bar to any action by the claimant on the same subject matter against any employee of the Government.[61] Nor is the employee liable indirectly by way of a suit for indemnity for his wrongful acts which have imposed liability on the Government.[62] Thus, there have been removed from the scales important factors which led to according the immunity—the undesirability of public office and the timidity and lack of bold and fearless action which would be induced by a possible personal liability.[63]

It is true that removal in Tort Act cases of that portion of the immunity covering situations which *might have been,* but in fact were not, occasions of action for official purposes might have some of the undesirable effects which gave rise to the immunity in private damage actions. For example, a tort action against the Government might disclose otherwise hidden errors or mistakes of an official to the public and his administrative superiors, and the possibility of this might induce timidity of action. But the display of such errors and mistakes is not entirely unwholesome. Trial of issues in the area in which discretion *might* have been exercised would, of course, take the time of, and accordingly burden, overworked officials. But against this, the policy of compensating citizens for wrongs done by Government employees certainly weighs heavier than it did on the days of complete sovereign immunity for wrongful acts.[64]

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[61] 28 U.S.C. § 2676.

[62] United States v. Gilman, 347 U.S. 507 (1954).

[63] See, *e.g.*, Spalding v. Vilas, *supra*, 161 U.S. at 495-496; Gregoire v. Biddle, *supra*, 177 F.2d at 581. See James, *op. cit. supra*, note 60, at pp. 652-653; Note, 66 HARV. L. REV. 488, at 495-496 (1953).

[64] If liability of the United States exists only "on a 'negligent or wrongful act or omission' of an employee," see 28 U.S.C. § 1346 (b), see also Dalehite v. United States, 346 U.S. at 44, it is arguable as a matter of statutory construction that the United States is not liable if the employees committing the act or omission are immune from liability. Some courts have indicated that liability on the part of the employees is a necessary element of liability on the part of the Government. *In re* Texas City Disaster Litigation, 197 F.2d 771, at 776 (5th Cir. 1952), *aff'd sub nom.* Dalehite v. United States, 346 U.S. 15; Kendrick v. United States, 82 F. Supp. 430 (N.D. Ala. 1949); See the opinion of Judge Woodrough in National Manufacturing Co. v. United States, 210 F.2d 263 (8th Cir. 1954), *cert. denied* 347 U.S. 967.

However, Chief Judge Magruder of the First Circuit expressed the opinion that

THE PROPOSED CONSTRUCTION

An exception from a waiver of sovereign immunity raises problems of the burden of proof. If a strict construction is applied to the statute waiving immunity, a party seeking to bring his case within the statute may be required to rebut the applicability of any of its exceptions. Though the results in particular cases may leave some doubts, a liberal construction is said to be appropriate for the Federal Tort Claims Act.[65] If the application of liberal construction is to have any meaning, it would seem that the discretionary function exception should not be considered jurisdictional in the sense that a plaintiff is required to rebut or disprove the presence of discretionary action or determinations in the matters upon which he bases his complaint. The historical analogies, particularly mandamus actions, support such treatment of the exception. Moreover, consideration of the problems of proving an affirmative as opposed to a negative and the availability of evidence as between the parties suggests that the proper treatment of the exception is to require the government to prove its applicability. Those cases specifically considering whether the exception presents a question of jurisdiction or defense support the treatment of it as a defensive matter.[66]

The proof required of the Government to establish the defense should be that the acts and omissions of which the plaintiff complains were specifically directed, or risks knowingly, deliberately, or necessarily encountered, by one authorized to do so, *for* the advancement of a governmental objective and pursuant to discretionary authority given

liability on the part of an employee was not an essential element of liability on the part of the Government. United States v. Hull, 195 F.2d 64, 68 (1st Cir. 1952). And the Government's position before the Supreme Court in the Dalehite case was simply that had to be a showing of negligent or wrongful conduct by an employee, regardless of whether the individual employee would be suable himself. Brief for the United States, p. 177. Though the general scheme of the act is one of imposing liability on a respondeat superior basis, no reason exists to demand absolute symmetry in this respect. As Judge Magruder pointed out, some courts have imposed liability on a respondeat superior basis where the employee involved would have had an immunity to such an action.

In United States v. Gilman, 347 U.S. 507 (1954), the Supreme Court held the Government had no action of indemnity against an employee whose wrongful acts subjected it to liability. If such a common element of an employer-employee relationship is denied because of the special relationship between the Government and its employees, it would seem that even if liability on the part of an employee is required in suits between private parties for imposition of liability on the employer, the special relationship between the Government and its employees, as well as the purposes of the act, would justify a deviation from that general rule.

[65] See, *e.g.*, United States v. Yellow Cab Co., 340 U.S. 543, at 554-555 (1951).

[66] Air Transport Associates v. United States, 221 F.2d 467 (9th Cir. 1955); Stewart v. United States, 199 F.2d 517 (7th Cir. 1952). *Cf.* Feres v. United States, 340 U.S. 135 at 140-141. *Cf. also* Jackson v. Irving Trust Co., 311 U.S. 494 (1940). *But cf. also* Munro v. United States, 303 U.S. 36 (1938); Phalen v. United States, 32 F.2d 687 (2d Cir. 1929).

him by the Constitution, a statute, or regulation—that is, authority to make a decision that the act, omission, or risk involved was one which it was necessary or desirable to perform or encounter *in order to achieve* the objectives or purposes for which he was given authority. So long as the act or omission is one which a Government employee was authorized to direct, and did direct, it is within the exception; so long as the risk involved is one which he was authorized to encounter in furtherance of the governmental objective, and did, it forms a necessary part of the discretionary function. It makes no difference, if the matter was within the employee's authority, that a judge would have decided to do otherwise, because the exception applies ". . . whether or not the discretion involved be abused." But where there is no authority to make such a decision in furtherance of a governmental objective—such as the mail truck driver's decision to further a policy of expediting the mails—the exception does not apply. Even where there might have been authority —as in failing to give warnings of an atomic bomb test for purposes of national security[67] or establishing a schedule of infrequent inspection of lighthouses as a deliberate choice between fewer lighthouses or fewer inspections[68]—if it was not in fact exercised, the act or omission would not be within the exception.

It cannot be denied that a tremendous burden of proof will thus be imposed on the Government. The burden is somewhat reduced by the fact that it will be important only in cases where other express exceptions are not applicable.[69] Nor can it be denied that the courts will be forced to review some executive decisions where it is claimed that certain acts or omissions were considered necessary to achievement of governmental objectives for the accomplishment of which authority was conferred on the employee so deciding or directing. However, the review will be limited to determinations of whether, as a matter of fact substantiated by the evidence, discretion was exercised, or whether the problem is such that without consideration of evidence it is apparent that the acts or omissions on which the complaint is based necessarily received consideration and played a part in a discretionary decision. The same is true in the mandamus field, where not every claim that the action involved was discretionary is recognized.[70] Indeed, it must occur under almost any construction in any case in which the exception is held

[67] Bulloch v. United States, 133 F. Supp. 885 (D. Utah 1955).
[68] *Cf.* Indian Towing Company v. United States, 350 U.S. 61 (1955).
[69] See note 5, *supra.*
[70] Lane v. Hoglund, 244 U.S. 174 (1917); Roberts v. United States, 176 U.S. 221 (1900); Kendall v. United States, 12 Peters 524, 37 U.S. 429 (1838).

inapplicable. Some such conflict is inevitable if the Tort Claims Act is to have any meaning and to provide the relief for which Congress enacted it.

On the other hand, it would be unrealistic to expect the Government to establish by direct testimony of the employees involved that each act, omission, or risk was foreseen and knowingly encountered. Not all governmental policy decisions are made by a single employee or even an identifiable group of employees. Though the belief may be prevalent that every action taken by Government employees is filed and recorded in quadruplicate as to every detail and minutiae, action in government, as in other areas, is frequently taken on the basis of unexpressed assumptions or considerations. In these areas the courts and the Government must rely on something in the nature of judicial notice or a defensive res ipsa loquitur. The process would be not unlike that by which courts decide as questions of law whether on the facts in evidence contributory negligence bars recovery, or that proximate causation does not exist and thus hold that negligence in assisting a man with a package onto a moving train involves no risk to a woman on the station platform many feet away.[71]

For example, it should take no direct proof that a discretionary decision to establish a wildlife sanctuary would involve, either consciously or by unexpressed assumption, a decision to incur the risk that birds will eat the grain of farmers in the area.[72] One deciding to conduct a test of an explosive atomic energy device obviously intends to run the risk that vibrations caused by the explosion may cause cracks to appear in buildings at a considerable distance.[73] One deciding where to locate an airbase for bombers or an ordnance proving ground must intend to cause that nuisance, annoyance, and damage which is necessary in the careful operation of either, and there is no need for his testimony to establish such a proposition.[74] And it should be on this basis that theories of absolute liability for engaging in extra-hazardous activities are held inapplicable in cases such as *Dalehite* rather than on the basis of a construction of the word "wrongful" as excluding harm inflicted in the course of an extra-hazardous activity.[75]

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[71] *Compare* Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

[72] *Cf.* Sickman v. United States, 184 F.2d 616 (7th Cir. 1950), *cert. denied* 341 U.S. 939.

[73] *Cf.* Bartholomae Corporation v. United States, 135 F. Supp. 651 (S.D. Calif. 1955).

[74] *Cf.* Barroll v. United States, 135 F. Supp. 441 (D. Md. 1955).

[75] Dalehite v. United States, *supra*, 346 U.S. at 45. See the statement of Chief Judge Parker in United States v. Praylou, 208 F.2d 291 (4th Cir. 1953), *cert. denied* 347 U.S.

In some cases the burden of proof imposed on the Government should not be difficult to sustain. For example, it should not be difficult to establish that a decision not to return to its private owner a coal mine seized but not operated during a national coal strike was based upon a consideration of the effect of such a return on the objectives of the seizure of all the coal mines in the nation.[76] Though the burden on the Government in other cases will be heavy, it seems preferable to impose such a burden rather than deny recovery, for example, to one whose car was damaged at an agricultural experiment station by the fall of an exotic tree because he was unable to prove that the tree no longer was used for experimental purposes but instead had been left there in a dangerous condition through oversight or neglect.[77]

The suggested limitation of the discretionary function exception finds textual support in the very language in which the exception is stated. The exception is of claims ". . . *based upon* the exercise or performance or the failure to exercise or perform a discretionary function or duty . . ." The exception is not of claims "arising out of" exercise or performance—the terminology used in the succeeding subsection, 28 U.S.C. § 2680 (b). If the acts or omissions on which the plaintiff bases his complaint were not acts specifically directed, or risks knowingly, deliberately, or necessarily encountered, in the discretionary determination to perform or not to perform the function or duty, his complaint is not "based upon" the performance or failure to perform such functions and duties. It is, instead, based upon acts or omissions which had nothing to do with the functions or duties. They were acts or omissions treated as irrelevant to achievement of the governmental purposes, and acts or omissions which, he contends, properly performed would have caused him no injury. The treatment afforded his claim should be the same as that of a claim based upon the act or omission of an employee

934: "It should be noted that the liability asserted here against the government is not one arising out of the mere possession of property, but one created by law for the invasion of personal and property rights. It is clearly within the power of the state to enact legislation imposing such liability, and it is equally clear that any such invasion of rights, whether intentional or not, can be made a wrongful act on the part of the one guilty of the invasion, and is made such by a statute imposing liability therefor. As said in the A.L.I. *Restatement of Torts*, p. 16, the word "'tortious,' which means wrongful, 'is appropriate to describe not only an act which is intended to cause an invasion of an interest legally protected against intentional invasion, or conduct which is negligent as creating an unreasonable risk of invasion of such an interest, but also conduct which is carried on at the risk that the actor shall be subject to liability for harm caused thereby, although no such harm is intended and the harm cannot be prevented by any precautions or care which it is practicable to require'." 208 F.2d at 293.

[76] *Cf.* Old King Cole Co. v. United States, 88 F. Supp. 124 (S.D. Iowa 1949).

[77] *But cf.* Toledo v. United States, 95 F. Supp. 838 (D. Puerto Rico 1951), cited with approval by the majority in Dalehite v. United States, 346 U.S. at 37.

of the Government who fails to exercise due care in the execution of a statute or regulation. In such a case the claim is not based upon the statute or regulation, or the policy which they serve, but upon negligent conduct unrelated to, or not a part of, the statute or regulation. The express language of statutory exception involved in such cases does not bar the claim *unless* the employee was exercising due care.[78] The fact that it is a part of the same section which contains the discretionary function exception is certainly support for the construction here suggested. And the legislative history of the section, while far from conclusive, suggests that both portions of the section be construed in the same manner and in the manner here suggested.[79]

One possible conflict with the statutory language does appear. The construction proposed would permit the imposition of liability, *but only if local tort principles would sanction such a result*, in cases where through oversight or neglect there was a failure to exercise discretion. On the other hand the statutory language of the exception excludes from the coverage of the act claims based upon "the failure to exercise or perform a discretionary function . . ." The proposed construction would in effect insert the word "discretionary" before the word "failure." Perhaps the awkwardness of the sentence structure with the insertion is an explanation of its omission; perhaps the word "failure" was not used with the familiar meaning of common parlance but in the somewhat forced technical sense of "refusal" sometimes given it

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[78] Nor has there been difficulty in finding liability in such cases. Hatahley v. United States, 351 U.S. 173 (1956).

[79] The paragraph of explanation which accompanied the section in committee reports on the bills which incorporated the section from the time of its original introduction is quoted in full, *supra*, note 10. One sentence of the paragraph reads: "This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, *where no negligence on the part of any Government agent is shown*, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation was invalid." (emphasis supplied). The committee reports thus join statutes, regulations and discretionary functions in a single sentence for comment, and indicate that with all liability can be imposed if there is a wrongful act other than those necessary to conduct of an authorized activity. A later sentence in the report does read, "The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion." But, as the word "such" indicates, in the context of the report, that sentence refers to claims against regulatory agencies based upon an alleged abuse of discretionary authority, and not to negligence in the conduct of an activity such as a flood-control or irrigation project. In terms of the construction here suggested, the distinction is that the acts or omissions of regulatory agencies of which complaint is made are usually acts deliberately and intentionally directed, even though the decision to so act or direct might be considered "negligent." But in the conduct of other government activities there may be negligent acts or omissions which were not directed by one with authority to do so.

in legal jargon. More important, as mentioned above,[80] the exception was added as a clarifying amendment to achieve the results which probably would have been the product of judicial construction without such an express statement. In the mandamus cases, where there is an equally sensitive approach to the relation between the judiciary and other branches of the Government, the failure to exercise or perform a discretionary act must be a discretionary refusal to preclude issuance of the writ.[81] Such a formula, developed in a context in which sovereign immunity held a dignified place, certainly should be sufficient to protect the interests of the Government under a statute waiving that immunity as well as the purposes of legislators drafting such a statute. Moreover, as additional confirmation that the construction would achieve the purposes for which the exception was drafted, it appears that the results obtained through such a construction of the exception are not unlike those which the courts probably would have reached through application of orthodox principles of tort law.

As lawyers are well aware, the process of determining what is negligent conduct is a process of weighing a variety of factors in determining upon a desirable social result; the extent of the risk, and the gravity of the harm which will occur if the risk eventuates are weighed against the utility of the actor's conduct, the possibilities that the interests for which the actor acts will be advanced by his particular course of conduct, the alternative courses of conduct available to the actor, and the expense to the actor and the public of requiring a different course of conduct.[82] When the courts are called upon to achieve a desirable social result or a sound public policy it is unlikely that they would substitute their judgment for that of the legislature in the enactment of a statute, or, with less certainty, the decision of an authorized administrative official issuing a regulation or determining upon a course of conduct he believed necessary to achieve governmental objectives with respect to which he was given authority and discretion. In such cases argument as to what is the just social result or sound public policy is foreclosed by the decisions of the legislature or official that certain acts, omissions, or risks must be performed or encountered to achieve the governmental objective. There is no need for the court to weigh the factors involved; that has already been done by one authorized to do so. But where the act or omission involved is not one which was directed, or a risk knowingly, deliberately, or necessarily encountered

[80] See note 11, *supra*.
[81] See cases cited in notes 45 and 46, *supra*.
[82] RESTATEMENT, TORTS §§ 291-293 (1934); PROSSER, TORTS § 30 (2d ed. 1955).

in the furtherance of the objectives or purposes for which authority was given, there has been no prior determination or weighing, and the courts are free to use the ordinary principles of negligence in determining whether it is a desirable social result or sound public policy to impose liability for such acts or omissions.

It may be expected that in a number of cases there would be difficulty under the proposed construction in determining whether a plaintiff's injuries were caused by acts or omissions which were discretionary within the meaning suggested or whether they were caused by non-discretionary acts or omissions. The problem would be particularly acute where it appeared that the injuries inflicted, or at least a portion of them, would have been caused by the discretionary acts and omissions. However, problems of proof of causation and apportionment of damages are not new to courts, and even problems of joint or concurrent causation have accepted formulas for solution. Where the defendant's negligently-caused forest fire joined with another forest fire of unknown origin and caused harm to the plaintiff, one court held in a well-known case that the defendant, to establish a defense, must show that (a) the other fire was innocently caused and (b) that it would by itself have caused the harm of which the plaintiff complained.[83] Section 432 of the *Restatement of Torts* goes further and provides that a jury may impose liability for the negligent or culpable cause even though the innocent cause would also have produced the same harm.[84] Cases considering the problem of liability where both the innocent cause and the culpable cause proceed from the same party are infrequent, but, at least where the injury is indivisible, it would seem unjust to deny liability.[85] These principles may be applied to cases arising under the Federal Tort Claims Act under the construction proposed. Both the proposed construction and these principles of tort law would require the Government to show that each of the acts or omissions of which a plaintiff complains were innocent—that is, that they were a part of the discretionary determinations made. Failure to make such proof would result in liability because the claim would not be based upon the innocent, discretionary acts or omissions, but upon culpable acts or omissions.

[83] Kingston v. Chicago & Northwestern Ry. Co., 191 Wis. 610, 211 N.W. 913 (1927).

[84] RESTATEMENT, TORTS § 432 (2) (1934) "If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about." See also, PROSSER, TORTS § 44 (2d ed. 1934).

[85] See Note, 31 WASH. L. REV. 177 (1956); See also Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127 (1934).

APPLICATION OF THE PROPOSED CONSTRUCTION TO DECIDED CASES

As suggested above, the proposed construction would supply a reconciliation of the leading Supreme Court cases *if* the *Dalehite* case is viewed as one which involved affirmative, discretionary determinations as to what should be done and what risks should be encountered to achieve certain governmental objectives. Neither the *Indian Towing* nor the *Union Trust Company* case was susceptible of such a characterization, at least in the posture in which the cases came before the Court. And the more recent case of *Hatahley v. United States*[86] presents no problem in this respect since the lack of statutory authority for the acts of the Government employees also established the lack of discretion. Cases decided by lower courts indicate that those courts have acted in accordance with the proposed construction in cases where factors, such as in arbitrary circumstances of time, have made it possible to separate the discretionary acts from those which did not involve discretion.

Where the discretionary decision to admit dependents of military personnel or civilians to Government hospitals has been separated by the time factor from the later negligence in treatment, the courts have not hesitated to impose liability.[87] Where the decision to release a patient from a mental hospital *might* have been made in the furtherance of a governmental policy, courts, applying a blanketing type of immunity, have denied liability.[88] The cases seem inconsistent with the

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[86] 351 U.S. 173 (1956).

[87] United States v. Gray, 199 F.2d 239 (10th Cir. 1952); Costley v. United States, 181 F.2d 723 (5th Cir. 1950); Grigalauskas v. United States, 103 F. Supp. 543 (D. Mass. 1951), *aff'd*, 195 F.2d 494; Dishman v. United States, 93 F. Supp. 567 (D. Md. 1950). The fact that the appeal taken by the Government in the Grigalauskas case, *supra*, was limited to the question of damages may reflect a conclusion by the Department of Justice that the discretionary function exception is inapplicable in such cases, or at least that it is futile to attempt to convince the courts that it is.

[88] Smart v. United States, 207 F.2d 841 (10th Cir. 1953); Kendrick v. United States, 82 F. Supp. 430 (N.D. Ala. 1949). For contrary results under the New York Court of Claims Act, see the cases cited in note 10, *supra*. *Cf.* Denney v. United States, 171 F.2d 365 (5th Cir. 1948), affirming a judgment for the Government entered on a motion to dismiss and holding the exception applicable to a claim for the death of a child allegedly caused by the negligence of the government in failing to furnish necessary hospital and medical services at the time of the birth of the child. It appears from the separate opinion of Judge Sibley, who concurred on the ground that Texas law did not permit recovery on such a cause of action, that the plaintiff offered to prove that officials at the army hospital gave assurances that the child would be cared for, that they had attended the expectant mother and given her medical aid prior to the date of birth, and that on that date when requested to take her to the hospital they advised that an ambulance was on the way. In the Costley case, *supra*, note 83, a different panel of the Court of Appeals for the Fifth Circuit distinguished the Denney case on the basis that Mrs. Costley had been admitted to the hospital whereas Mrs. Denney had not, saying that in the Denney case there was no liability because hospital or ambulance facilities were not available or medical attendance was not practicable. The distinction

admission cases and they leave a suspicion of doubt or dissatisfaction because the proof of discretion was not certain. The governmental policy might just as well have been served by further retention and treatment and the decision to release made solely on the basis of an unreasonable mistake as to the condition of the patient.[89] Where a time factor made it possible to separate an assumed discretionary decision to mark or not to mark a wreck from negligence in the manner in which the marking buoy was set up and maintained, liability was imposed.[90] Likewise, where an assumed discretion as to the manner of constructing irrigation canals was separated by time from alleged negligence in maintenance of the canals liability could be found.[91] It was clear that the failure to place lights at night at the dams in a Government-maintained system of locks played no necessary part in the discretionary decision to establish and operate the locks where lights had been so placed for a long period of time and the rules established by the officer in charge required that lights be set out where the locks were left unattended in darkness.[92] A possibly discretionary decision as to what witnesses should be questioned in the course of an army investigation is separable from decisions as to the manner of questioning or grilling witnesses.[93] Where an assumed discretion to explode an atomic energy device,[94] set up coyote traps,[95] a road block,[96] or not to "dedud"

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is obviously fallacious. In the Denney case the plaintiff was not permitted to prove the contrary of those facts. (The burden of proof should, of course, have been on the Government to establish its defense.) The ordinary principles of tort law would impose no liability for failure to render service gratuitously to army dependents, but would impose liability for the termination of the services if they left the person aided in a worse position than he was when the services were begun. RESTATEMENT, TORTS § 323 (1934). Liability would likewise be imposed if army officials, by their gratuitous undertaking, had led the dependents to refrain from taking necessary steps to obtain aid from then available protective action by third persons. RESTATEMENT, TORTS § 325 (1934).

[89] The fact that regulations governing the procedures for discharging patients may have been followed should not be conclusive, if the employees of the Government failed to exercise due care while following the procedures. In such a case the claim is not based upon the procedure established, but upon the negligent failure of employees to observe that the condition of the patient was not such as to make those procedures appropriate. Moreover, the pertinent regulations may consist of no more than a check list of things to be done in the course of releasing a patient, similar to operating manuals distributed by large private businesses, and unrelated to the policies or objectives of the Government in furnishing such medical assistance. *Cf.* Carr v. United States, 136 F. Supp. 527, at 534 (E.D. Va. 1955).

[90] Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951).

[91] Desert Beach Corporation v. United States, 128 F. Supp. 581 (S.D. Calif. 1955).

[92] Bevilacqua v. United States, 122 F. Supp. 493 (W.D.Pa. 1954).

[93] Hambleton v. United States, 87 F. Supp. 994 (W.D. Wash. 1949), *rev'd on other grounds*, 185 F.2d 564.

[94] Bulloch v. United States, 133 F. Supp. 885 (D. Utah 1955).

[95] Worley v. United States, 119 F. Supp. 719 (D. Ore. 1952).

[96] Hernandez v. United States, 112 F. Supp. 369 (D. Hawii 1953).

[97] United States v. White, 211 F.2d 79 (9th Cir. 1954).

a target range,[97] was obviously separable from the negligent failure to give warnings, liability could also be found.

A recent decision of the Court of Appeals for the Eighth Circuit furnishes another interesting example.[98] The plaintiff was injured when his team of horses was frightened by a two-engined Beechcraft airplane of the Civil Aeronautics Administration which flew overhead not more than one hundred feet off the ground. The plane was engaged in making a survey for the purpose of establishing an instrument approach pattern for a neighboring airport. The trial court found from the evidence that it was the decision and judgment of the CAA that the most efficient and expedient method of obtaining the necessary data was by visual check from a low flying airplane traveling at the approximate height of the highest known obstruction in the area. It also appeared that the administration had decided that two-engined airplanes, rather than single-engined planes, were necessary for such operations.

The court of appeals reversed a judgment for the United States and remanded the case for further findings. It held that the discretionary function exception did not apply if the pilots of the plane failed to take reasonable care and precaution in their flight to avoid injury to persons in the position of the plaintiff. The court of appeals did not base its conclusion that there might be liability on the facts that the survey was made with a low-flying plane rather than from the ground or with a two-engine plane rather than a single-engine plane. The evidence had established that those with authority to do so had decided that the governmental purposes of establishing the instrument approach pattern made necessary the use of those techniques. (Using the construction of the exception here suggested, the trespasses, annoyances, and risks inherent in their use would thus be within the exception.) But failure to keep a lookout for persons in the position of the plaintiff and to use care to avoid harm to them if possible would be a basis for imposing liability because they formed no part of the discretionary function, either by design or by necessity.

An analogous case[99] involved a decision that preservation of a wildlife refuge made it necessary to spray with herbicide a dense growth of willows which were destroying vegetation necessary for food supply and preventing normal control of malarial mosquitoes. Though, as found by the trial court, the actual spraying work was done in a reasonable, prudent manner, some of the herbicide drifted onto and destroyed plain-

[98] Dahlstrom v. United States, 228 F.2d 819 (8th Cir. 1956).
[99] Harris v. United States, 205 F.2d 765 (10th Cir. 1953).

tiff's cotton. The decision to use a herbicide was not an unthinking choice of the easiest available means; other methods had been tried without success, and unless the willows were removed the purposes of a wildlife refuge and malarial control would, it was believed, have been defeated.[100] The court accordingly was correct in holding the discretionary function exception applicable, there having been no showing of acts or omissions on which liability could be predicated other than those deliberately performed with appreciation of the risks involved to achieve the governmental purpose.

Where the plaintiff complained only of injuries which he suffered when the Government changed the course of the Missouri River for purposes of transportation, but alleged no negligence in the details of the work done, the complaint was held to be barred by the discretionary function exception.[101] As the complaint was framed, the only acts and omissions on which he based his claim were those which were necessarily a part of the discretionary decision to improve water transportation on that portion of the river. In another case,[102] the plaintiff's complaint was that his property had been damaged by the use of excessively heavy charges of dynamite in deepening the channel of the Mississippi. The action was dismissed upon a showing that the specifications for the work, including the size of the dynamite charges, were prepared in a local headquarters office and approved by the Chief of Engineers in Washington. Such proof falls below that which it is suggested here be required to establish a defense. No reason appears why the deepening of the channel could not have been accomplished with smaller charges; there is no indication that the use of smaller charges would have been

[100] Not all of these facts appear in the findings of the trial court, which made only conclusionary finding that, "The decision to use the herbicide 2-4-D as a means to destroy the willows was made, both in the case of the Corps of Engineers and in the case of the Fish and Wildlife Service, by persons having the authority to do so, and in each instance involved the use of discretion as distinguished from a routine or ministerial act." 106 F. Supp. at 299. But the brief for the Government on appeal, at pp. 11-12, 18-19, makes it apparent that the evidence on which this finding was based was as summarized above.

[101] Coates v. United States, 181 F.2d 816 (8th Cir. 1950).

[102] Boyce v. United States, 93 F. Supp. 866 (S.D. Iowa 1950). The decision was cited with approval by the majority in the Dalehite case as being of like import with the Coates decision, *supra*, note 97. 346 U.S. at 36-37. The cases are distinguishable on the basis suggested above. If use of the excessively large charges was merely the result of an oversight as opposed to a discretionary determination that they were necessary to obtain an improved navigational system denial of liability would be in direct conflict with the purpose of the exception stated in the committee reports, *supra*, note 10. "This...exception [is] intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity...*where no negligence on the part of any Government agent is shown*, and the only ground for suit is that the same conduct by a private individual would be tortious..." (emphasis supplied.)

more expensive or that the governmental purpose of an improved navigational system depended upon the cost of the project being held within certain budgetary limits set by Congress. Approval of the specifications with the large charges could just as well have resulted from neglect or oversight as from a determination that such charges had to be used if the governmental purpose was to be accomplished.

Later decisions under the act have not utilized such a blanketing or peremptory application of the exception. Thus, the Court of Appeals for the Ninth Circuit, reversing a judgment against the United States for property damage done when an irrigation canal broke, held the discretionary function exception applicable to the alleged negligence of the Government in failing to line the entire canal with concrete.[103] But it did so, relying on testimony that the feasibility of the irrigation project depended upon its cost and that lining the entire canal system with concrete would have rendered the project unfeasible.[104] Since there was a failure of proof of negligence in any other respects, such as inspection of the canals, or the failure to line the particular portion of the canal in which the break occurred as opposed to other places where the canal was so lined, the complaint was based upon an omission deliberately determined upon as essential to the performance of the discretionary function of establishing the irrigation system.[105] As such, it was properly held to be barred by the discretionary function exception.

In another case[106] the plaintiff sought to recover for damage to its construction site caused when an upstream cofferdam constructed for the Government collapsed. The court denied the Government's motion for summary judgment because of the absence of proof as to whether the pertinent decisions regarding the planning and construction of the cofferdams were made by the Government in the exercise of executive and legislative discretion in authorizing the entire project or as a mere job of work incidental to the discretionary decision to construct the whole project. In action for damages to and loss of profits of plaintiff's business of raising small fish, turtles, and aquatic plants allegedly caused by the changes made in the contours of upstream lands during the construction of an air base the court denied a motion to dismiss, indicating that recovery might be had if the facts showed that the

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[103] United States v. Ure, 225 F.2d 709 (9th Cir. 1955).
[104] 225 F.2d at 712-713.
[105] 225 F.2d at 712.
[106] Atkinson Co. v. Merritt, Chapman & Scott Corp., 126 F. Supp. 406 (N.D. Calif. 1954).

plaintiff complained of acts or omissions other than the discretionary determination to build the airbase.[107] Another court denied a motion to dismiss where the complaint showed that it was based upon the diversion of water in excess of that given by decree to the predecessors in interest of the United States, possibly for use by the Government as owner of land, and not necessarily upon a discretionary determination to construct a weir or dam as a part of a public work or project.[108] In another case, the Court of Appeals for the Fifth Circuit affirmed a judgment for the Government, but based its decision on the failure of the plaintiff to establish negligence, and not upon blanket immunity which the trial court gave to all flights of planes from an air base at which experimental work was done.[109]

In cases of this sort the fact that a high ranking officer or employee directed the particular act or omission on which the complaint is based should not be of controlling importance. It should not be by the office of the person, but by the nature of the thing done that the applicability of the discretionary function exception is determined.[110] Negligent oversight as to matters having no relationship to achievement of governmental objectives is possible in higher echelons of government as well as in the lower levels; indeed, they frequently may be no more than a failure to discover and correct errors negligently made by lower level employees. But if the acts or omissions were specifically directed, or risks knowingly, deliberately, or necessarily encountered for the advancement of a governmental objective, they are so enmeshed with the discretionary decision to pursue that objective that they cannot be made the basis of a tort action without putting in question the desirability of that objective.

Application of the suggested construction of the discretionary function exception to decided cases indicates that liability would not be imposed in every case in which the act or omission was not directed as one necessary or desirable for achievement of the governmental objective. Liability must be found under local tort law. And ordinary rules of tort law would preclude imposition of liability in many cases considered by some courts to be within the exception. For example, many of the duties imposed by statute on government employees are duties which run only to the Government itself, and have no effect on private

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[107] Smith v. United States, 113 F. Supp. 131 (D. Dela. 1953).
[108] Ellison v. United States, 98 F. Supp. 18 (D. Nev. 1951).
[109] Williams v. United States, 218 F.2d 473 (5th Cir. 1955).
[110] *Cf.* Marbury v. Madison, *supra*, notes 42 and 43.

rights.[111] Construction of statutes which create no private rights or liabilities is certainly not a problem restricted to governmental liability.[112]

In the *Dalehite* case the majority held, and the dissenters did not appear to deny, that there could be no liability on the part of the Government for the alleged failure of the Coast Guard in fighting the fire at Texas City. The majority cited in support of its decision *Steitz v. City of Beacon.*[113] That decision, as well as *Moch v. Rensselaer Water Co.*,[114] on which it relied, turned largely upon familiar tort questions of to whom duties had been created by the city charter and the contract involved. It may well be that upon a proper construction the statutes requiring the weather bureau to make flood forecasts create a duty running only to the Government so that inaction alone would not create liability.[115] A statute requiring the Geological Survey to prepare estimates of the provable oil reserves on Government lands may well create only duties to the Government,[116] and statutory provisions governing the approval of FHA loans may create no duties to future tenants of the apartments whose owners obtain such a loan.[117] Audit duties imposed by statute may likewise involve no duties to private parties.[118] The duties imposed by statute on the Coast Guard to provide for the safety of navigation or conduct rescue operations may, at least insofar as a case involves only failure to take affirmative action, be duties which run only to the government and do not create private rights,[119] and the duty imposed on the Corps of Engineers to take action in times of flood may be, at least with respect to their failures to act, a duty owed only to the Government itself.[120] The same may be true with respect to some of the duties imposed by regulations on control tower operators at airports.[121] But where the statutory duty which the Government fails to perform is one which imposes liability on private parties who

[111] *Cf.* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).
[112] See RESTATEMENT, TORTS § 288 (1934).
[113] 295 N.Y. 51, 64 N.E.2d 704 (1945).
[114] 247 N.Y. 160, 159 N.E. 896 (1928).
[115] Mid-Central Fish Co. v. United States, 112 F. Supp. 792 (W.D. Mo. 1953), *aff'd sub nom.* National Manufacturing Co. v. United States, 210 Fed. 263 (8th Cir. 1955), *cert. denied* 347 U.S. 967.
[116] Jones v. United States, 120 F. Supp. 894 (W.D.N.Y. 1952), *aff'd* 207 F.2d 563, *cert. denied* 347 U.S. 921.
[117] Choy v. Farragut Gardens, 131 F. Supp. 609 (S.D.N.Y. 1955).
[118] Social Security Admin. F.C.U. v. United States, 138 F. Supp. 639 (D. Md. 1956).
[119] See Justice Frankfurter's statement in Indian Towing Company v. United States, *supra*, note 32: "The Coast Guard need not undertake the lighthouse service." 350 U.S. at 69. *Cf.* Lacey v. United States, 98 F. Supp. 219 (D. Mass. 1951).
[120] Clark v. United States, 109 F. Supp. 213 (D. Ore. 1952), *aff'd* 218 F.2d 446.
[121] Smerdon v. United States, 135 F. Supp. 929 (D. Mass. 1955).

similarly fail to perform the duty imposed, liability should be imposed.[122]

Those cases construing statutes as creating no private rights or liabilities frequently represent the unsuccessful attempt to supply a duty to act—to make nonfeasance where there is no misfeasance a basis for imposing liability. Though the distinction between nonfeasance and misfeasance may find its basis more in the history of the common law forms of action than in reason, logic, or justice, it is, with its sometimes arbitrary, artificial, and unsatisfactory results, a part of our tort law.[123] The familiar area is that of the rescuer or "good Samaritan". And in this area, cases arising under the Federal Tort Claims Act appear to have accepted the general prevailing rule that while there is no duty to go to the rescue of one in peril not caused by the actor,[124] there is a duty to use due care not to injure the rescued person or not to leave him in a worse position than he was found.[125] Of course, one may leave those he intended to aid by his good Samaritan acts in a worse position by creating a situation dangerously misleading to the intended beneficiaries.[126]

If the duties to act imposed by particular statutes and regulations are duties running only to the Government there would be no liability under familiar tort principles for a failure to act. But if the Government acts, it acts as a good Samaritan with respect to beneficiaries. In such cases, if the discretionary function exception is inapplicable, the Government will be liable on good Samaritan principles for the harm wrongfully inflicted when that duty is undertaken and negligently performed.

Conclusion

The discretionary function exception of the Federal Tort Claims Act has caused considerable confusion and a very substantial amount of litigation. It may well rank highest as the "clarifying" amendment which did most to obscure the purposes of a statute. If the courts would treat the exception only as the reminder it was apparently in-

[122] Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951). See, *e.g.*, The Mary S. Lewis, 126 F. 848 (D.C. Conn., 1903).

[123] Bohlen, *Moral Duty to Aid Others as the Basis of Tort Liability*, 56 U. of Pa. L. Rev. 217, 316 (1908); Ames, *Law and Morals*, 22 Harv. L. Rev. 97 (1908). See Restatement, Torts § 314 *et seq.* (1934).

[124] Lacey v. United States, *supra*, *note* 119.

[125] United States v. Lawter, 219 F.2d 559 (5th Cir. 1955).

[126] *Cf.* Indian Towing Company v. United States, *supra*, note 32. *Cf. also* Foley v. State, 294 N.Y. 275, 62 N.E.2d 69 (1945).

tended to be, the results would be more just and the purposes of the act better served.

The analogies of mandamus actions and private damage suits against public officers, analyzed in light of their reasons, and the ordinary principles of tort law furnish a satisfactory construction for the exception. Liability cannot be imposed when condemnation of the acts or omissions relied upon *necessarily* brings into question the propriety of governmental objectives or programs or the decision of one who, with the authority to do so, determined that the acts or omissions involved should occur or that the risk which eventuated should be encountered for the advancement of governmental objectives. But if the acts or omissions were not directed or necessarily a consequence of what was directed they form no part of the discretionary determination. Imposition of liability in such a case does not involve a questioning of the propriety of the discretionary action.

Allowing the defense on the basis suggested will, of course, result in the rejection of many claims which appear to be meritorious. The objection would appear to run however, not to the construction given the exception, but to adoption of a statute which limits compensation to those claims sustainable on tort principles developed in suits between private parties. Orthodox tort principles reach their limits as a system of compensation at that point where the award calls into question and condemns a public policy decided upon by one who had the authority to do so. If the constitutional provisions for just compensation included just compensation for "damage" for public use as well as for "taking" for public use, as do the constitutions of a number of states, the gap in the system of compensation for the burdens of federal activity would be considerably narrower.[127] But tort principles supply no basis for distinguishing between the annoyance and inconvenience necessarily caused to residents near a jet air base established for our national defense and the harm caused, for example, to a manufacturer of cosmetics or jewelry through the imposition of a luxury tax to meet the financial burdens of national defense. They justify an award to neither.

Of course, holding the exception applicable on the basis suggested, also opens the possibility that recoveries will be denied if Government employees under pressure from superiors or from faulty memories testify that the acts or omissions were considered and deemed necessary or desirable for achievement of the governmental purpose. Faulty

[127] *See* Harris v. United States, 205 F.2d 765 (10th Cir. 1953); North v. United States, 94 F. Supp. 824 (D. Utah 1950).

memories present no novel problems for courts, and much of our system of justice necessarily operates on the assumption that witnesses will tell the truth. Moreover there is less reason for an official to falsify his testimony in an action which would not result in a judgment against him personally than in cases between private parties where such is the result. Indeed, in many cases it would seem to be the much wiser course for an employee interested in promoting his personal career to admit a negligent oversight than to assert poor judgment in determining that the acts or omissions involved were necessary or desirable for the achievement of the governmental objective. Moreover, an assertion that the acts or omissions involved in many cases were considered to be necessary or desirable for the achievement of the governmental objectives would strain credulity and certainly require more proof than the assertion alone.[128]

One other area remains where claims will be denied—claims for the advantages which would have been conferred on citizens by a better administration of government. Where Government employees are lax in performance of those duties which run only to the Government, but do not affirmatively injure or make worse the position of the plaintiff, claims for the advantages which would have accrued through a better administration must be denied. Enactment of the Federal Tort Claims Act will thus give greater emphasis to the undesirable distinction drawn in tort law between misfeasance and nonfeasance. However, there is nothing in the Federal Tort Claims Act which suggests that duties to act should be imposed on the Government where they would not be imposed in suits between private parties or that tort actions against the Government were provided as an alternative means of getting a high level of good government which previously was obtainable only through the ballot box.[129]

The purpose of this article has not been to suggest a scheme which will equitably distribute all of the burdens and costs of government.

[128] *Cf.* Worley v. United States, 119 F. Supp. 719 (D. Ore. 1952) (failure to post signs warning of the presence of traps known as coyote getters); Bulloch v. United States, 133 F. Supp. 885 (D. Utah 1955) (failure to give warning of impending explosion of atomic device); Carr v. United States, 136 F. Supp. 527 (E.D. Va. 1955) (recovering all crashed airplane by conducting extensive dredging operations on oyster beds for twenty and one half hours); Dahlstrom v. United States, 228 F.2d 819 (8th Cir. 1956) (failing to keep a lookout for persons on the ground while conducting an aerial survey from a low level).

[129] This is not to say that such a system could not be devised as a supplement to the ballot box. French courts have apparently developed such a system of principles. See Schwartz, *Public Tort Liability in France*, 29 N.Y.U. LAW REV. 1432 (1954); Jacoby, *Federal Tort Claims Act and French Law of Governmental Liability: A Comparative Study*, 7 VAND. L. REV. 246 (1954); STREET, GOVERNMENTAL LIABILITY, at 56-80 (1953).

Its scope has been much more limited. The purpose has been only that of suggesting a proper construction for a troublesome and very important exception of the existing Federal Tort Claims Act. Perhaps, however, when what has been accomplished by existing legislation has been made clear, determination of what additional legislation is necessary will also be more apparent.